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HASSAN NAWALI v. PP

COURT OF APPEAL, SANDAKAN
DAVID WONG DAK WAH JCA
HAMID SULTAN ABU BACKER JCA
KAMARDIN HASHIM JCA
B [CRIMINAL APPEAL NO: S-05(M)-437-12-2016]
12 JANUARY 2018

CRIMINAL PROCEDURE: *Appeal – Conviction and sentence – Accused person arrested in drug raid – Arrest made based on information and description of alleged*
C *drug trafficker – Accused person allegedly carrying plastic bag containing 69.46g methamphetamine – Accused person convicted for offence of drug-trafficking – Sentenced to death – Whether there was credible and sufficient evidence to convict and sentence accused person – Accused person's defence that he suffered from stroke – Whether expert medical evidence adduced during trial – Whether prima facie case*
D *established – Whether defence ought to be called – Whether conviction and sentence safe – Dangerous Drugs Act 1952, ss. 37(d), (da) & 39B(1)(a)*

Acting upon information and based on the description of a drug trafficker given, the police arrested the appellant in a raid. During the arrest, he handed over a plastic bag containing three plastic packets of clear, crystallised
E substances which were later confirmed by the chemist to be 69.46g of methamphetamine. The appellant was subsequently charged at the High Court for trafficking in dangerous drugs, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). In the appellant's defence, he submitted, *inter alia*, that (i) he had been a stroke patient two years before
F the arrest and could not raise his right hand and leg; and (ii) it would be impossible for him to carry the plastic bag. At the conclusion of the trial, the High Court Judge ('the HCJ') was of the opinion there was a probability that the physical condition of the appellant had improved as he admitted that he walked from his house to the scene. The appellant was convicted for the
G offence and sentenced to death. Hence, the present appeal. In support of his appeal, the appellant submitted that (i) the HCJ had held that, the presumption under s. 37(d) of the DDA applied and the appellant had trafficked drugs, by accepting the prosecution's version that the appellant carried the plastic bag containing drugs on the day he was arrested; (ii) there
H was no *prima facie* case proven on the standard of proof beyond reasonable doubt at the close of the prosecution's case and the defence ought not to be called; (iii) the statutory presumption should have been invoked as there was no evidence of possession of drugs tendered by the prosecution; and (iv) the HCJ disregarded the physical condition of the appellant who suffered stroke and hence opined that the appellant could carry the drugs and this was
I without any medical or evidentiary basis at all.

Held (allowing appeal)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) Only Police Inspector PW2 gave evidence on the arrest, the receipt of drugs and that the appellant had ran but was subsequently detained. There were no other witnesses from the team who gave evidence that the appellant was not incapacitated as alleged by the defence. There was also no credible DNA evidence or fingerprint evidence to connect the appellant exclusively with the plastic bag where the drugs were found. In short, the HCJ substantially relied on PW2's evidence to call for the defence of trafficking. There was no such evidence of photos or recording of the incident produced before arrest, save as to photos related to after arrest. In consequence of lack of credible and cogent evidence to link the appellant to the drugs, a *prima facie* case has not been established. Drug offences are serious offences and court should not easily entertain weak evidence to call for the defence. (paras 10-12)

(2) There was no merit in the appellant's argument on ss. 37(d) and 37(da) of the DDA. Section 37(d) may assist the prosecution in all offences specified in the DDA. However, s. 37(da) could only become operational once custody, control, knowledge with actual possession had been established. The trial judge had rightly relied on the provision of s. 37(d) but the evidence to rely on the provision related to s. 37(d) was anchored on weak evidence, therefore not satisfying the test for *prima facie* case, to call for defence. (paras 18-19)

(3) The trial judge ruled against the appellant without the benefit of medical evidence to support his surmise and conjecture. Expert evidence on important issues which would relate to the culpability in criminal cases could not be substituted by views on those issues by trial judge. The trial court could not decide on technical issues without the benefit of expert evidence. There are tests to be conducted before one could say that a person has recovered from his illness and/or disability. (para 23)

(4) Based on the facts of the case, from the prosecution stage and the defence case, it would be unsafe to convict. The principle related to *prima facie* case and the requirement of credible evidence to call for defence had been compromised. Furthermore, failure to give sufficient weight to the defence story in relation to his medical incapacity, which was not debunked by the prosecution at all material stage of the proceedings, compromised the integrity of the decision-making process. The conviction and sentence of the High Court was set aside and the appellant was acquitted and discharged of the charge. (paras 25 & 26)

Bahasa Malaysia *Headnotes*

Bertindak atas maklumat dan berdasarkan gambaran yang diberi tentang seorang pengedar dadah, pihak polis menahan perayu dalam satu serbuan. Semasa ditangkap, perayu menyerahkan sebuah beg plastik yang mengandungi tiga bungkusan plastik lut sinar berisi bahan kristal yang kemudian disahkan oleh ahli kimia sebagai 69.46g methamphetamine. Perayu dituduh di Mahkamah Tinggi kerana mengedar dadah, satu kesalahan bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Dalam pembelaan perayu, dia menghujahkan, antara lain, bahawa (i) dia pesakit strok selama dua tahun sebelum tangkapannya dan tidak boleh mengangkat tangan dan kaki kanannya; dan (ii) mustahil baginya membawa beg plastik tersebut. Pada penutup perbicaraan, Hakim Mahkamah Tinggi ('HMT') berpendapat terdapat kemungkinan keadaan fizikal perayu telah pulih kerana dia mengaku berjalan dari rumahnya ke tempat kejadian. Perayu disabitkan atas kesalahan dan dijatuhkan hukuman mati. Maka timbul rayuan ini. Menyokong rayuannya, perayu menghujahkan (i) HMT memutuskan bahawa, anggapan bawah s. 37(d) ADB terpakai dan perayu mengedar dadah, dengan menerima versi pihak pendakwaan bahawa perayu membawa beg plastik berisi dadah pada hari dia ditangkap; (ii) tiada kes *prima facie* yang terbukti berdasarkan standard pembuktian melampaui keraguan munasabah pada penutup kes pihak pendakwaan dan pembelaan tidak sepatutnya dipanggil; (iii) anggapan statutori sepatutnya dibangkitkan kerana tiada keterangan milikan dadah yang dikemukakan oleh pihak pendakwaan; dan (iv) HMT tidak mengendahkan keadaan fizikal perayu yang mengalami strok justeru berpendapat perayu boleh membawa dadah-dadah tersebut dan ini tidak disokong oleh apa-apa asas perubatan atau keterangan sama sekali.

Diputuskan (membenarkan rayuan)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Hanya Inspektor Polis PW2 seorang yang memberi keterangan tentang tangkapan, penerimaan dadah-dadah dan bahawa perayu cuba melarikan diri tetapi berjaya ditahan. Tiada saksi-saksi lain daripada pasukan tersebut yang memberi keterangan bahawa perayu kekurangan keupayaan, seperti yang didalihkan oleh pembelaan. Tiada juga keterangan DNA yang boleh dipercayai atau keterangan cap jari untuk mengaitkan perayu, secara khusus, dengan beg plastik yang di dalamnya dadah-dadah tersebut ditemui. Tiada kemukaan keterangan gambar mahupun rakaman insiden tersebut sebelum tangkapan dibuat kecuali gambar-gambar selepas tangkapan. Akibat ketiadaan keterangan yang boleh dipercayai dan meyakinkan untuk mengaitkan perayu dengan dadah-dadah tersebut, kes *prima facie* gagal dibuktikan. Kesalahan berkaitan dadah adalah serius dan mahkamah tidak boleh sewenang-wenangnya melayan keterangan lemah untuk memanggil pembelaan.

(2) Tiada merit dalam hujahan perayu tentang ss. 37(d) dan 37(da) ADB. Seksyen 37(d) mungkin membantu pihak pendakwaan dalam kesemua kesalahan yang diperuntukkan di dalam ADB. Namun begitu, s. 37(da) hanya beroperasi apabila jagaan, kawalan, pengetahuan dengan milikan sebenar dibuktikan. Hakim bicara telah, dengan betul, bersandar pada peruntukan s. 37(d) tetapi keterangan untuk bergantung pada peruntukan berkaitan s. 37(d) adalah berpandukan keterangan lemah lantas tidak memenuhi ujian kes *prima facie* untuk memanggil pembelaan.

(3) Hakim bicara memutuskan bertentangan perayu tanpa manfaat keterangan perubatan yang menyokong kesimpulan dan agakan beliau. Keterangan pakar tentang isu-isu penting yang akan mengaitkan dengan kebersalahan dalam kes-kes jenayah tidak boleh diganti dengan pendapat-pendapat hakim bicara tentang isu tersebut. Mahkamah bicara tidak boleh memutuskan tentang isu-isu teknikal tanpa manfaat keterangan pakar. Terdapat ujian-ujian yang perlu dijalankan sebelum boleh mengatakan seseorang itu sudah pulih dari penyakit dan/atau kecacatannya.

(4) Berdasarkan fakta kes, dari peringkat pendakwaan dan kes pembelaan, tidak selamat untuk menjatuhkan sabitan. Prinsip berkenaan kes *prima facie* dan keperluan keterangan yang boleh dipercayai untuk memanggil pembelaan telah terjejas. Tambahan lagi, kegagalan memberi pemberatan secukupnya pada naratif pembelaan tentang kekurangannya dari segi perubatan, yang tidak disangkal oleh pihak pendakwaan pada setiap peringkat material prosiding, menjejaskan integriti proses membuat keputusan. Sabitan dan hukuman yang dijatuhkan oleh Mahkamah Tinggi diketepikan dan perayu dilepaskan dan dibebaskan daripada pertuduhan.

Case(s) referred to:
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Mohd Khayry Ismail v. PP [2014] 1 LNS 412 CA ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Noor Azman Abidin v. PP [2014] 1 CLJ 58 ***(refd)***
Phrueksa Taemchim (Thailand) v. PP [2013] 10 CLJ 1 CA ***(refd)***
PP v. Mohd Aszzid Abdullah [2008] 1 MLJ 281 ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Oo Boon Khim [2013] 1 LNS 986 CA ***(refd)***
PP v. Saimin & Ors [1971] 1 LNS 115 HC ***(refd)***
PP v. Sukumaran Sudram [1999] 4 CLJ 242 HC ***(refd)***
PP v. Thenegaran Murugan & Another Appeal [2013] 4 CLJ 364 CA ***(refd)***
U Television Sdn Bhd & Anor v. Comintel Sdn Bhd [2017] 10 CLJ 580 FC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(d), (da), 39B(1)(a)

A *For the appellant - Ken Yong & Noor Ilienna Rahayu Ibrahim; M/s Ken Yong & Co*
For the respondent - Mohd Zain Ibrahim, DPP

[Editor's note: Appeal from High Court, Sandakan; Criminal Appeal No: SDK-45A-1/ 2-2015 (overruled).]

Reported by Najib Tamby

B

JUDGMENT

Hamid Sultan Abu Backer JCA:

C **[1]** The appellant's appeal on conviction and sentence in relation to a charge under s. 39B(1)(a) came up for hearing on 26 September 2017. We allowed the appeal principally on the ground that the learned trial judge had failed to give due weight and consideration to the defence story.

[2] In the instant case, the appellant's evidence of his incapacity on D medical grounds to discredit prosecution's sole witness evidence was not debunked by the prosecution at the prosecution stage and/or at the defence stage, thereby making the conviction and sentence unsafe. In addition, the prosecution evidence through PW2 as well as chemist evidence to link the accused was in our view, weak evidence to establish a *prima facie* case more so when the arrest was as a result of prior information by an informer. E Further, the chemist report in respect of DNA was not conclusive to implicate the appellant.

[3] It must be emphasised here again and again that the hallmark in writing judgment in criminal case substantially requires the trial judge to F weigh the case of the defence even though at the most it will only stand as a story without supporting evidence. The story has to be contrasted with the version of the prosecution and their witnesses, and whenever possible, the court is obliged to take the most favourable evidence or contradiction which will corroborate or support the defence story and decide whether a G conviction or acquittal ought to be granted. The threshold in criminal cases to accept the defence story generally is low and only in cases where presumption or it's like, the story of the defence must be able to create a reasonable doubt in the mind of the trial judge. To create a reasonable doubt, the court has gone to the extent of saying a plausible explanation by the accused is sufficient. That is to say, there are two standard of proof to weigh H the defence story. Generally for Penal Code offences, creating a doubt in the mind of the judge is sufficient, whereas for drug offences, etc. the standard of proof rests on achieving the requirement of what we call as reasonable doubt. Support for the proposition is found in a number of cases. To name a few are as follows:

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(i) Sharma J guidelines in *Public Prosecutor v. Saimin & Ors* [1971] 1 LNS 115; [1971] 2 MLJ 16, is one trial courts just not ought to be familiar with but must demonstrate in their judgments their ability to apply to the facts of the case and deliver a conscionable judgment. His Lordship in that case had asserted:

> The following principles are not only sound but well recognised in practice:
>
> (1) The onus of proving everything essential to the establishment of the charge against the accused lies on the prosecution;
>
> (2) The evidence must be such as to exclude to a moral certainty every reasonable doubt of the guilt of the accused;
>
> (3) In matters of doubt it is safer to acquit than to condemn.

(ii) In *PP v. Noor Azman Abidin* [2014] 1 CLJ 58, the Court of Appeal considered the case of *PP v. Saimin & Ors* [1971] 1 LNS 115; [1971] 2 MLJ 16 and had this to say:

> The hallmark of judgment writing in criminal case is achieved only when there has been a just and fair assessment of the defence story as long as it is not inherently incredible taking into consideration that it is for the prosecution to prove its case beyond reasonable doubt at the prosecution case as well as the defence stage, notwithstanding the fact where the law may require the defence to rebut the charge on balance of probabilities. Lack of proper assessment will in actual fact compromise the integrity of the decision making process, making the conviction unsafe. The related jurisprudence on assessment of the defence case was eloquently stated by Justice Sharma as early as 1971 in the case of *PP v. Saimin & Ors* [1971] 1 LNS 115; [1971] 2 MLJ 16 in the following words:
>
> > A conviction cannot be sustained even if the court is satisfied that the prosecution story "may be true" unless and until it is found that the prosecution story "must be true." The burden of proof remains on the prosecution throughout the trial. If the learned magistrate was not satisfied with the case of the prosecution it was his duty to acquit and discharge the accused at the close of the prosecution case. **The falsity of the defence does not relieve the prosecution from proving the prosecution case beyond reasonable doubt.** (emphasis added).

(iii) In *PP v. Thenegaran Murugan & Another Appeal* [2013] 4 CLJ 364, the Court of Appeal discussed the jurisprudence relating to unsafe to convict and had this to say:

In the Singapore case of *Yusof bin A Samad v. PP* [2004] 4 SLR 58, it was stated:

> In addressing the question whether there was any failure or miscarriage of justice or whether a conviction was unsafe, the court will ask itself the subjective question of whether it was content to allow the verdict to stand, or whether there was some lurking doubt that an injustice had been done to the appellant.
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> In our view whether it is a subjective or objective question or test it must in criminal cases be a decision where there is lurking doubt leans in favour of the accused.
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> On the factual matrix of the case we find it unsafe to sustain the conviction substantially based on the testimony of SP2, in the absence of any independent witness or any other corroborative evidence to support the assertion that it was Lobo who slashed Murali and caused his death. (See *Jandel Singh v. State of Madhya Pradesh* (SC) (2003) 2 LRI 609).

The Charge

[4] The charge was under s. 39B(1)(a) of the Dangerous Drug Act 1952 (DDA) for trafficking. The charge reads as follows:

> Bahawa kamu, pada 07/01/2015 jam lebih kurang 12.30 tenghari, bertempat di kawasan setinggan Kg. Mangkalinau Batu 3 Sandakan, dalam daerah Sandakan, di dalam Negeri Sabah, Malaysia, bukan sebagai seorang yang diberi kuasa atau disifatkan sebagai seorang yang telah diberi kuasa di bawah Akta Dadah Berbahaya 1952, kamu telah didapati telah mengedarkan dadah berbahaya sejumlah 69.46 gram Methamphetamine. Oleh itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta Yang Sama.

Brief Facts

[5] The brief facts as well as the grounds of decision as summarised before us in a rudimentary style can be stated as follows:

1. On 7.1.2015, Inspector Solahuddin (PW2) led a drug raid with an information and description of a drug trafficker. PW2 saw the man as per description given and PW2 went and introduce himself as a police officer to that man. That man was later identified as the accused/appellant (OKT). OKT tried to run away but was apprehended by the police team. OKT then handed over a black plastic bag and found 3 transparent plastic packet contain clear crystalised substance suspected to be syabu. OKT was arrested and the drugs were sent for analysis at Jabatan Kimia Malaysia.
2. PW5 (Chemist) analysed the suspected substance to be methamphetamine with pure weight of 69.46 gram.

3. It was the defence assertion at the prosecution stage itself that OKT was a stroke patient even two years before arrest and had been admitted to Kent Hospital Sandakan on 8.8.2013 for ischemic stroke. After arrest, OKT was examined by Dr Ee Lay Ze (PW1) and PW1 took the blood sample of OKT for DNA analysis. PW1 testified that OKT cannot raise his hand vertically and OKT also cannot raise his right leg. Most probably OKT could not run. OKT may recover from the stroke but he will not go back to his premorbid state. If his condition improved, OKT could hold something in his right hand.

4. It was suggested by the defence that OKT was suffering from stroke and it would be impossible for him to carry the said plastic bag. It is impossible for OKT to run as alleged by the prosecution. OKT was supposed to go to Bandar Kim Fong to meet his wife to buy his medicine. OKT was not the actual person as per the information and the actual target managed to escape after throwing the plastic bag to the ground to distract the attention of PW2 and his team. PW2 then collected the plastic bag and threw it to OKT. OKT was beaten by the police team at the scene. PW2 kicked OKT to the ground. OKT has been framed and was subjected to police brutality.

5. The defence called Dr The Yuan Kai (DW2), the doctor who had prepared a report dated 29.7.2016. The report confirmed that the examination done at the Kent Hospital. DW2 prepared the report based on case note review and not on patient review. DW2 said it is difficult to comment the accuracy of the report based on the case note review.

[6] Findings of the learned judge as summarised in a rudimentary style before us *inter alia* read as follows:

1. Whether the prosecution had proven a *prima facie* case.

The offence took place 2 years after the accused (OKT) was admitted to the Kent Hospital for Ischemic Stroke. PW1's evidence has little relevance to OKT physical condition on 7.1.2015. There was a photo of OKT able to squat down with his hand at his back because OKT was handcuffed and other photos showed that OKT was able to stand up. OKT was at the scene waiting for a taxi. This means OKT had been walking from his house to the scene. It is safe to infer that OKT physical condition has improved. OKT did not deny he was at the scene which further confirmed that he was able to walk. OKT did not run away, he only attempted to run. The weight of the drugs was only 151.6 gram which is relatively light and it would not be difficult to hold it in his right hand.

It is highly improbable for the police to frame OKT of a serious offence and to assault OKT at public place. OKT had both custody and control of the black plastic bag. No serious challenge was made against PW5. When the envelope was brought to the court, it was in a good condition

A and it was only cut open in the presence of the defence counsel. There is no doubt that the envelope was the same envelope received from PW7 from PW5.

2. Whether the defence was able to raise a reasonable doubt.

B OKT denied any knowledge about the existence of the drug in the plastic bag. This line of defence is obviously an afterthought invented by OKT and should be rejected. OKT said PW7 was at the crime scene where PW7 was at the office during the arrest. There is no necessity for PW2 to inform PW7 if indeed PW7 was at the crime scene. It was also highly improbable that a Sargent Major, SM Ghani to record his statement because s. 37A(1) of the Act provides only officer of or above the rank C of an Inspector is authorised to record any statement from OKT. *There is a real probability that the physical condition of OKT have been improved. OKT also admitted that he walked from his house to the scene. If the police really wanted to frame OKT, they would not have waited for 1 hour before OKT arrived at the scene*." (Note: the surmise and conjecture which destroys the integrity of the decision making process).

D

[7] Learned counsel for the appellant before us in reliance of the petition of appeal *inter alia* complaints that:

(a) the trial judge had held that the presumption under s. 37(d) of the Act applied and the appellant had trafficked drugs by accepting the E prosecution version that the appellant had carried the plastic bag containing drugs on the day he was arrested.

(b) the statutory presumption should not have been invoked as there was no evidence of possession of drugs tendered by the prosecution.

F (c) there was no *prima facie* case proven on the standard of proof beyond reasonable doubt at the close of the prosecution case and the defence ought not be called.

(d) there was no evidence of possession or actual possession.

G (e) the trial judge disregarded the physical condition of the appellant who suffered ischemic stroke and hence opined that the appellant could carry the drugs which was without any medical or evidentiary basis at all.

Issue On Possession

[8] In the instant case, it is not in dispute that the arrest took place in H consequence of earlier information of a description of a man trafficking drugs in an area where the defence counsel says is infested with drug problems. PW2 was the arresting officer and he had led a team of police officers who did not give evidence at all more so when there was already an allegation at the prosecution stage that the appellant was incapacitated on medical grounds I and his right hand which was partially incapacitated by stroke was not capable of carrying the drugs or able to run.

[9] PW2 also said before the arrest when he introduced himself as police officer, the appellant ran away and was apprehended by two other team members. However, during cross-examination he conceded that he did not run.

[10] It is important to note in the instant case that only PW2 gave evidence in respect of arrest and receipt of drug as well as the appellant had ran and subsequently was detained by two other team members. There was no other witnesses of the team who gave evidence to say that the appellant was not incapacitated as alleged by the defence. It must be asserted here that courts generally have taken the position that evidence of police officers are worthy of belief with a caveat to say that Malaysian jurisprudence does not entertain pure self-serving evidence of a police officer's oral testimony without sufficient corroborative evidence. In the instant case, for example, if PW2 evidence is expunged the prosecution case would collapse as there was no credible nexus to the drug and appellant.

[11] There was also no credible DNA evidence or fingerprint evidence to connect the appellant exclusively with the said plastic bag where drugs were found. In short, the learned judge had substantially relied on PW2 evidence to call for the defence of trafficking. At this time and era where smart phones has become the norm for ordinary persons to carry, it would not have been difficult for other team members to record the events to place probative value to the prosecution stage more so when it was said to be a pre-planned raid based on prior information as well as description. There was no such evidence of photos or recording of the incident produced before arrest, save as to photos related to after arrest. If such recordings were taken and produced, it would have given high probative force. In addition, it would have been relevant under the principles related to *res gestae*, thereby giving high probative value. (See *Mohd Khayry Ismail v. PP* [2014] 1 LNS 412; [2014] 4 MLJ 317).

[12] In consequence of lack of cogent evidence as well as credible evidence to link the appellant to the drugs, the court was obliged to rule that a *prima facie* case has not been established. Drug offences are serious offences and court should not easily entertain weak evidence to call for the defence. To ascertain what is weak evidence in drug case in an objective manner needs the application of common sense jurisprudence. One methodology to do so will be for the trial judge to place in the shoes of the accused and ask the pertinent question as per this case, whether the single evidence of PW2 with no credible forensic nexus to the drugs will be sufficient to reach a *prima facie* case which ultimately may lead to a conviction of death. In doing so, the learned trial judge must keep in mind the well-established jurisprudence related to coherent as well as credible evidence to reach the *prima facie* case

as stated in a number of cases. To name a few are as follows: (i) *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734; (ii) *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457; [2005] 6 AMR 203. In *PP v. Mohd Aszzid Abdullah* [2008] 1 MLJ 281, it was stated:

> The two stages of criminal proceedings are captured in s. 173(f) of the CPC for trial before the subordinate courts and s. 180 for trials before the High Court. There was a statutory duty for the prosecution to establish a *prima facie* case before the court is obliged to call for the defence. A *prima facie* case materially consists of more than two concepts related to EA. They are issues relating to standard of proof and weight of evidence or also referred to as probative value or probative force.
>
> A *prima facie* case is established where there is sufficient evidence to be called upon to answer and evidence adduced by the prosecution must be such that it can only be overthrown upon hearing evidence in rebuttal by the defence to the prosecution case. The force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts that exist did not happen. The court must at the close of the prosecution case undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offences have been established. The test is: is the evidence sufficient to convict the accused if he elects to remain silent? If there is any such doubt there can be no *prima facie* case. As the accused can be convicted on the *prima facie* evidence, it must reach a standard which is capable of supporting a conviction beyond reasonable doubt.

[13] In theory, *prima facie* evidence is not related to evidence which we normally say as conclusive evidence or evidence beyond reasonable doubt. To establish *prima facie* case, the law only requires the prosecution to demonstrate sufficient credible evidence, establishing each essential ingredient of the offence to establish guilt on the basis if the accused has no answer to the charge, he must be convicted. The answer to the charge will only come at the defence stage and if he does not answer or give satisfactory explanation, then what was established as a *prima facie* case becomes a case where the prosecution has established the case beyond reasonable doubt. Even at *prima facie* stage, the court has to scrutinise the prosecution evidence strictly which is normally referred to as a maximum evaluation process of prosecution evidence in relation to each essential ingredient of the offence. The theory related to *prima facie* or beyond reasonable doubt is one related to mental gymnastics which the court is obliged to exercise correctly without any elements of prejudice against the accused in favouring the prosecution's version or evidence. (See *PP v. Sukumaran Sudram* [1999] 4 CLJ 242; [1999] 4 MLJ 426).

[14] PW2's evidence *per se* on the factual matrix of the case in our view, is a weak evidence and not sufficient to call for the defence. In saying so, we must distinguish cases of drug trafficking where a passenger at the airport upon arrival is found to have drugs in his handbag or luggage when the prosecution has established the nexus to the bag as well as the passenger. The instant case is not the same. To put it crudely, the prosecution in this case is inviting the court to hang a person purely on the evidence of PW2 without showing some credible nexus to the bag as well as the drugs when there was clear evidence to say that the arrest was related to an informer and the DNA evidence was not conclusive and/or exclusive to implicate the accused.

[15] Learned counsel for the appellant in reliance of *Muhammad Hassan v. PP* [1998] 2 CLJ 170 asserts that:

> It is trite that the Prosecution must prove the element of custody and control and the trial court must make an affirmative finding of having had "in custody or under ... control anything whatsoever containing" the drug, whereas to arrive at the presumption of "trafficking" under s. 37(da), a finding of being "in possession" of the drug is necessary, in addition to proof of the relevant minimum quantity specified.

Section 37(d) of the DDA 1952 says:

> (d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.

[16] Section 37(da) in essence, which relates to the weight of drugs as well as lack of authority to possess drugs says that "should be presumed until the contrary is proved to be trafficking in the said drugs".

[17] Both the sub-sections and its nexus and commonality was dealt in great detail by the Court of Appeal in the case of *Phrueksa Taemchim (Thailand) v. PP* [2013] 10 CLJ 1, where the court held:

> (1) Section 37(d) may become operational the moment custody and control of the drugs is established. However, without proof of knowledge it is insufficient to apply the presumption of possession. Mere knowledge alone without exclusivity of either physical custody or control or both is insufficient in law to constitute possession, let alone trafficking. Section 37(da) can only become operational once custody control, knowledge with actual possession has been established (paras 10 & 11).
>
> (2) The fact that it uses the word 'presumption' does not mean that ss. 37(d) or 37(da) of the DDA independently can stand to say the accused is guilty of the offence. It only pushes on to the accused some burden to explain his involvement relating to the drug which is said to be in his custody, control and possession by fact or law. (para 16)

A (3) The law does not require for the presumption to be invoked *per se* by the judge. Presumption of law under s. 4 of the Evidence Act 1950 ('EA 1950') attaches by operation of law as long as the basic elements are satisfied. Whether the trial judge says in his grounds of judgment that it is a finding of actual possession or he is invoking the statutory presumption is immaterial as far as s. 4 of the EA 1950 is concerned. (para 19)

B

(4) The fact that the drugs were found in the stomach and recovered when excreted satisfied the element of custody, control inclusive of possession by operation of law by virtue of s. 37(d) itself. In addition the fact that it was concealed in the stomach and was transported at least
C attracted more than two grounds stated in s. 2 of the DDA, i.e. concealing, transporting, etc. The positive element as opposed to the passive conduct to show intention to trade or deal in the drugs to attract trafficking will be satisfied by the irresistible inference proposition to drive home the charge of trafficking pursuant to s. 2 of the DDA itself and without any reliance on ss. 37(d) or 37(da). (para 39)

D

(5) On the factual matrix of the case a charge of trafficking could be sustained by application of s. 37(da) of the DDA.

[18] We do not find any merit in the appellant's argument on ss. 37(d) and 37(da). To put it simply, s. 37(d) may assist the prosecution in all offences
E specified in DDA 1952. However, s. 37(da) can only become operational once custody, control, knowledge with actual possession has been established.

[19] In the instant case, the learned judge has rightly relied on the provision of s. 37(d) but the evidence to rely on the provision related to s. 37(d) is
F anchored on weak evidence, thereby not satisfying the test for *prima facie* case, to call for defence, as stated in a number of cases.

Defence Case

[20] Notwithstanding the prosecution evidence was weak, the learned trial
G judge also had not given weight to the story of the accused. The court is obliged to give weight to the story of the accused as long as it is not inherently incredible. In *Phrueksa Taemchim*'s case, the Court of Appeal at p. 11 on this issue observed:

[16] What ss. 37(d) or 37(da) attempts to do is that it effectively changes
H the common law position which requires *actus* as well as *mens rea* for criminal culpability. However, the fact that it uses the word 'presumption' does not mean ss. 37(d) or 37(da) independently can stand to say the accused is guilty of the offence. It only pushes on to the accused some burden to explain his involvement relating to the drug which is said to be in his custody, control and possession by fact or law. (see *PP v. Yuvaraj*
I [1968] 1 LNS 116; [1969] 2 MLJ 89 PC; *Lee Chee Meng v. PP* [1992] 1 CLJ 345; [1992] 1 CLJ (Rep) 168).

[17] Section 37(d) or s. 37(da) also effectively changes the burden of proof placed on the prosecution in some aspect by whittling the test laid down in *Woolmington v. DPP* [1935] AC 462 – ie, the beyond reasonable doubt test. (See *PP v. Mohd Aszzid Abdullah* [2008] 1 MLJ 281). And also places the burden on the accused to rebut the statutory presumption on the balance of probabilities. If accused fails to do so conviction will result. However, the concession for the accused is that notwithstanding ss. 37(d) or 37(da) attempts to place an onerous burden on the accused in contrast to the common law position, over the years courts have whittled down the 'test of balance of probabilities' in favour of the accused to an extent that it is sufficient if the story of the accused is not inherently incredible and that story when tested with prosecution case creates a doubt in the mind of the judge as advocated in *Sochima*'s case and which this panel has dealt with in a number of cases. (See (i) *Munuswamy Sundar Raj v. PP* [2013] 1 LNS 183; (ii) *Zulkifli Md Rodzi v. PP* [2013] 4 CLJ 250; (iii) *Rozmi Yusof v. PP* [2013] 4 CLJ 384; (iv) *Tong Kam Yew & Anor v. PP* [2013] 4 CLJ 470; [2013] 3 AMR 248).

[18] In actual fact the so called burden on the balance of probabilities in drug cases have become illusory through the ingenuity of the counsel or courts, all for the single purpose of ensuring that a probable innocent person is not convicted by presumption, inference and statutory imposition in breach of art. 5(1) of the Federal Constitution which says:

No person shall be deprived of his life or personal liberty save in accordance with law.

What these presumptions have achieved is that it has now forced the accused to speak of his innocence when that was not the position under the common law.

[21] On the issue of PW2's evidence and its contradiction as to medical incapacity, learned counsel had submitted in length and to save courts time we highlight some of the relevant parts only:

27. There is one more important issue we wish to highlight. PW2 told the Court that the Appellant held the bag plastic bag with his right hand.

Q65. Bagaimana cara lelaki tersebut pergi ke garaj kenderaan di kawasan tersebut?

A: Berjalan kaki sambil memegang 1 plastik hitam di tangan kanan.

28. PW2 told the Court that after having been apprehended the Appellant passed the black plastic bag to him using the right hand.

Q77. Setelah kamu berjaya menahan tertuduh apa yang kamu buat?

A: Lelaki tersebut telah menyerahkan dengan menggunakan tangan kanan kepada saya 1 plastik hitam.

29. However, DW2 a medical officer from Hospital Duchess of Kent informed the Court that due the stroke, the upper right limb of the Appellant although has improved needed assistance if he has to grab something.

30. The Appellant told the Court that the black plastic bag contained two small bottles of mineral water and the taped plastic bag. We submit that there was nothing inherently improbable for the Appellant in his condition after the stroke to be unable to carry the black plastic bag contained two small bottles of mineral water and the taped plastic bag in it.

31. Furthermore, the Prosecution did not challenge the two bottles of mineral water. And what is more crucial is that there is no DNA evidence or fingerprint evidence to connect the Appellant with the said black plastic bag, if indeed he was carrying it on that day.

32. PW2 also testified that the Appellant ran away towards the entrance of Kg. Mangkalinau when he shouted "police".

Q71. Apa yang dia lakukan?

A : Dia lari.

Q72. Dia lari ke arah mana?

A: Ke arah jalan masuk.

33. However, when PW2 was cross-examined changed his testimony after realising that the Appellant has had a stroke before. See NOP Q213 to Q219.

34. We submit therefore, the testimony of PW2 is not convincing. He flipped flopped during trial and looking at the whole circumstances of the case there was no evidence of possession or actual possession by the Appellant.

35. Tested against the whole circumstances of the case, it would be doubtful if the Appellant could carry the plastic bag containing two bottles of mineral water and drugs in it with the right hand after the stroke, and then ran towards the entrance from the garage carrying the said plastic bag with the right hand, without any fingerprint or DNA on the said plastic bag, and with PW2 reversing his evidence about the Appellant not running but only 'trying to run' (a material contradiction)."

…

45. Moreover, in our present case, there was DNA evidence found on P3 (swab on small black plastic bag) and E2 ((swab on transparent plastic bag – see NOP page 120, paragraph 11). P3 contained a mixture of DNA types from at least three sources (one from the Appellant) and E2 contained a mixture of DNA types from at least two sources (one from the Appellant).

46. There is an open question of who else had touched the barang kes, and could these people be the raiding officers themselves? The findings of DNA is consistent with the Appellant's version, i.e. that the he was forced to touch the barang kes by the raiding officers.

47. One last point on the DNA evidence, is that the Prosecution failed to tender any DNA evidence or other forensic evidence (for e.g., the Appellant's fight thumb fingerprint) to connect the Appellant with the outer black plastic bag, which is the most crucial piece of evidence to support PW2's testimony that he saw the Appellant carried the outer black plastic with the right hand and walked towards the garage."

…

50. We submit that the Trial Judge has predominantly disregarded the physical condition of the Appellant who had suffered ischemic stroke and hence opined that the Appellant could carry the drugs which was without any medical or evidentiary basis at all.

51. Evidence of the Appellant who suffered ischemic stroke on the right side of his body is not challenged. He was admitted in the Hospital (HDOK) on 08.08.2013. See IDD2 of ROA Jilid 3, which is marked as D2.

52. According to D2, the Appellant last review was on 10.07.2014 (seven month from 07.01.2105), he is said to be:

- 10/7/2014 - last MOPD clinic review
- Able to ambulate, but still having weakness & with hemiplegic gait
- BP 130/80, PR 78
- Right upper limb power 3/5, right lower limb power 4/5

53. First of all, the Trial Judge made a wrong finding, in that he stated in his Judgement that the Appellant used his left hand when he handed the black plastic bag to the police officers after arrest took place at Kg Mangkalinau. See ROA, Jilid 1, page 15 line 7.

54. This finding of fact is in wrong since PW2 told the Court it was the right hand.

A

Q77. Setelah kamu berjaya menahan tertuduh apa yang kamu buat?

A: Lelaki tersebut telah menyerahkan dengan menggunakan tangan kanan kepada saya 1 plastik hitam.

B

55. With due respect, the Trial Judge wrongly thought that the Appellant was holding the black plastic bag with his left hand when arrested. We submit the Trial Judge has predominantly disregarded the physical condition of the Appellant. An analysis of the medical condition of the Appellant during the stroke and after improvement is vital.

C

…

58. It is in the evidence that the condition of the Appellant has improved and that comments by D2 of the Appellant's improvement was based on the last review on 10.07.2014. Albeit the improvement, we submit that the Trial Judge has failed to consider:

D

a. for his right arm and hand, with power of 2/5 when suffering stroke to 3/5 on 10.07.2014, the Appellant is still able to garb anything except with assistance;

b. able to move the right hand against gravity but only when the hand is empty;

E

c. the Trial Judge erroneously held that the gross weight of the drugs at 151.13 gram was relative light and not difficult for the Appellant to hold (paragraph 20 at page 24, ROA Jilid 1) but omitted to consider the two bottles of mineral water inside the black plastic bag);

F

d. for his right leg, with power from 1/5 to 4/5 which means from not able to walk (only flickering of muscles) to able to ambulate, but with but with weakness which means not full power and with an abnormal gait;

e. the Trial Judge held that PW2 did not say that the Appellant had ran away. It was probable that the Appellant had ran away after PW2 introduced himself (paragraph 20, page 24 ROA Jilid 1).

G

f. This finding is completely against the evidence of PW2 who said that the Appellant was running away from the garage towards the entrance road;

H

Q71. Apa yang dia lakukan?

A : Dia lari.

Q72. Dia lari ke arah mana?

I

A: Ke arah jalan masuk.

g. This finding also goes against the medical evidence that the Appellant is able to ambulate, but with weakness which means not full power and with an abnormal gait;

h. The Trial Judge failed to consider that the Appellant will not go back to his pre-morbid state despite the improvement;

i. The Trial Judge failed to appreciate that the duration from the last review to the date of 'commission' of crime was only 7 months, thus in the absence of rebuttal evidence from the Prosecution it is inherently probable that the state of the Appellant's condition was as described by D2.

59. With due respect, a fair assessment of the medical evidence by the Trial Judge would not result in the errors committed by his Lordship. We submit that there was misdirection by the Trial Judge on material evidence, which is the defence case, resulting in the Trial Judge's failure to fully appreciate the defence case.

[22] The learned Deputy Public Prosecutor in the submission on the defence story says:

(i) the learned judge found that the defence story is a make-up story and insufficient to rebut the presumption of knowledge under sub-s. 37(d);

(ii) the appellant has failed to cast any reasonable doubt on the prosecution's case.

[23] We have looked at the appreciation of evidence by the learned judge in respect of the medical issue and we took the view that the learned judge without the benefit of medical evidence to support his surmise and conjecture ruled against the appellant. Expert evidence on important issues which will relate to culpability in criminal cases cannot be substituted by views on those issues by trial judge. The Federal Court, even in civil cases had ruled that the trial court cannot decide on technical issue without the benefit of expert evidence. There are tests to be conducted before one could say that a person has recovered from his illness and/or disability. (See *U Television Sdn Bhd & Anor v. Comintel Sdn Bhd* [2017] 10 CLJ 580; [2017] 5 MLJ 292). Much judicial time will be saved to repeat that part of the judgment related to medical issues which read as follows:

[14] While the prosecution is contending that the Accused was carrying the black plastic bag the Accused on the other hand suggested that it is impossible for the Accused to carry the said black plastic bag because he is a stroke patient. It was submitted that it is not possible for the Accused to run as alleged by the prosecution due to his condition. Further the Accused also suggest that he had been framed by the police and was subjected to police brutality.

[15] The issue of the medical condition of the Accused had been established by the defence through the cross examination of PW1 (Dr. Ee Lay Ze). This witness was called by the prosecution to prove the fact that he had collected the blood sample of the Accused for DNA analysis. During cross examination of this witness PW1 told the court that the Accused was admitted to the Duchess of Kent Hospital Sandakan on 8th day of August 2013 for ischemic stroke. PW1 testified that at the time of admission his power over the right upper limb was 2/5 which means that he could not raise his hand vertically. His power over the right lower limb was 1/5 which means that he could not raise his right leg. PW1 agree that the Accused's condition could deteriorate. PW1 also testifying that he did not treat the Accused but state that if his condition did not deteriorate nor improve most probably he could not run. He also agrees that the Accused is currently on medication for high cholesterol. In re-examination the witness told the court that there is a possibility that the Accused may recover from the stroke but he will not go back to his premorbid state. He also said that if his condition improved, he could hold something in his right hand.

[16] In view of the medical/physical condition of the Accused as confirmed by PW1 can we now say that the very foundation of the prosecution case has collapsed? Should the court take the evidence of PW1 on face value without considering other facts that has been established by the prosecution?

[17] In this regard it must be pointed out that the offence was allegedly committed on 7th day of January 2015. The Accused was admitted to Duchess of Kent Hospital Sandakan on 8th day of August 2013. The offence was committed more than 2 years after he was admitted to the hospital for Ischemic stroke. Hence the PW1's evidence on the Accused's physical condition of 8th day of August 2013 has little relevance to his physical condition on 7th day of January 2015. From the photograph of the Accused at exhibit P3(5) and (6) it can be seen that he is able to squat down with his hands at his back, probably because he was handcuffed. The photographs at exhibit P4 (1) - (5) show that the Accused was able to stand up. Furthers in his cross examination of PW2, the Accused suggested that he was supposed to go to Bandar Kim Fung, Sandakan to meet his wife to buy his medicine. He was at the scene waiting for a pirate taxi. This means that the accused had been walking from his house to the place where he was arrested. From the above facts it is safe to infer that he physical condition of the Accused have improved since the time he was diagnosed with ischemic stroke. In fact the Accused did not deny that he was at the scene which further confirms that he was able to walk from his house.

[18] The Accused in his cross examination also attempted to cast doubt on the prosecution case when he challenged PW2's evidence that the Accused had attempted to run when he (PW2) introduced himself as a police officer. It was suggested that due to his condition there is no need for the Accused to run away.

[19] In this respect the words used by PW2 was the Accused had attempted to run. In Bahasa Malaysia PW2 used the word "ingin melarikan diri". In my opinion the word "attempted to run" do not mean that the Accused had ran away after PW2 introduced himself as a police officer. PW2 did not say that the Accused had run away. In view of the fact that he Accused was not arrested at his house, it is safe to infer that he had walked from his house to the garage area where he was attested. Hence it is probable that he had done an act of attempting to run away after PW2 introduced himself as a police officer.

[20] Further it was also PW2's evidence that he weigh the exhibit in the presence of the Accused when he was at the police station. It was revealed that the weight of the exhibit was 151.6 gram. In this respect, I take judicial notice that 151.6 gram is relatively light in term of weigh and it would not be difficult for the Accused, considering his physical condition, to hold it in his right hand.

[21] I am also of the opinion that it is highly improbable for the police to frame the Accused of this serious offence. While the prosecution did not call either member of the raiding team to corroborate PW2's evidence, in view of the fact that the arrest was done at a public place (as can be seen from the photograph at exhibit P3(l) - (3)), it is highly improbable for the police team to throw the black plastic bag to the Accused and then put it in his hands because such act can be seen by anyone happened to be at the vicinity of the scene. For the same reason, I am also of the opinion that it is highly improbable for the police team to assault the Accused in a public place.

[22] In the circumstances, I am of the opinion that the Accused was the person who carried the black plastic bag containing drug with his right hand at the time of his arrest. The act of holding indicates that the accused was in control of the said plastic bag.

[24] It is well settled that to rebut the charge of trafficking a plausible explanation by the accused may be sufficient. In *Public Prosecutor v. Oo Boon Khim* [2013] 1 LNS 986, the Court of Appeal dealt with the meaning of 'plausible explanation and reasonable doubt' in relation to acquittal and had this to say:

It is now well settled that the threshold requirement to rebut the charge of trafficking is low, as propounded by a number of cases which had considered *Radhi*'s direction as well as the case of *Sochima Okoye v. Public Prosecutor* [1995] 1 MLJ 538. (See *Rozmi bin Yusof v. PP* [2013] 4 CLJ 384*; Ahmad Mukammal bin Abdul Wahab & Ors v. PP* [2013] 4 CLJ 949).

As long as the story of the accused is not inherently incredible the court has to test the story with that of the prosecution and if it creates a reasonable doubt in the mind of the judge it is sufficient to earn an acquittal. The test whether the story is capable of being accepted as not

being inherently incredible must necessarily be one that demonstrates 'plausible explanation' to earn an acquittal. The 'plausible explanation' proposition was advocated as early as 1981, in the Privy Council decision of *Ong Ah Chuan v. PP* [1981] 1 MLJ 64 where Lord Diplock had this to say:

> Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible – even if there were no statutory presumption such as is contained in section 15 of the Drugs Act.

[25] It is well settled that it is in the hands of the trier of facts to assess the quality of evidence and to determine whether the evidence on record justifies a conviction. Taking a holistic view of the facts of the case from the prosecution stage as well as defence case, we take the view that it will be unsafe to convict. In addition, the principle related to *prima facie* case and the requirement of credible evidence to call for defence in the instant case has been compromised. Further, failure to give sufficient weight to the defence story in relation to his medical incapacity which has not been debunked by the prosecution at all material stage of the proceedings compromises the integrity of the decision making process warranting the appellate court to quash the conviction as well as sentence.

[26] For reasons stated above, the conviction and sentence of the High Court is set aside and the appellant is acquitted and discharged of the charge.

We hereby ordered so.